

MINUTES
Montana Fish, Wildlife & Parks Commission Meeting
Helena Headquarters
Helena, MT
SEPTEMBER 13, 2006

Commission Members Present: Steve Doherty, Chairman; Tim Mulligan, Vice-Chairman; John Brenden; Shane Colton; Vic Workman.

Fish, Wildlife & Parks Staff Present: Jeff Hagener, Director, and FWP Staff.

Guests: See September 13, 2006 Commission file folder.

Topics of Discussion:

- 1. Opening - Pledge of Allegiance**
- 2. Approval of August 3, 2006 Commission Minutes**
- 3. Approval of Commission Expenses through August 31, 2006**
- 4. Clarification of Public Comment Opportunities at Commission Meetings-Info**
- 5. Parks Biennial Fee Rule – Tentative**
- 6. Smith River Special Use Area Rule – Tentative**
- 7. Ulm Pishkun State Park Easement Acquisition – Endorsement**
- 8. Lone Pine State Park Easement Acquisition – Endorsement**
- 9. Bannack State Park Land Exchange – Endorsement**
- 10. L&C Heritage Greenway South Shore Conservation Easement – Endorsement**
- 11. 2007 Annual Rule for Sale of Non-Resident Combination Licenses – Tentative**
- 12. Future Fisheries Funding Cycle of July, 2006 – Final**
- 13. Authority to Stock Tiger Muskellunge – Final**
- 14. Old Steel Bridge FAS/Right of Way Grant to Flathead County – Final**
- 15. Little Doney Lake Easement Proposal – Endorsement**
- 16. Dutchman Wetland Acquisition – Final**
- 17. I-154 – Commission Discussion - Informational**
- 18. Public Opportunity to Address Issues Not Discussed at this Meeting**

1. Opening - Pledge of Allegiance. Chairman Doherty called the meeting to order at 8:00 a.m. and led the Pledge of Allegiance.

2. Approval of August 3, 2006 Commission Minutes.

Action: Colton moved and Brenden seconded the motion to approve the minutes of the August 3, 2006 Commission meeting. Motion carried.

3. Approval of Commission Expenses through August 31, 2006.

Action: Mulligan moved and Colton seconded the motion to approve the Commission expenses as presented. Motion carried.

4. Clarification of Public Comment Opportunities at Commission Meetings - Informational.

Director Hagener explained that confusion regarding when the Commission will accept public comment at the meetings has prompted this discussion. There are two primary issues to be dealt with.

The first issue is the agenda item entitled “Public Opportunity to Address Issues Not Discussed at this Meeting”. FWP thought this statement was clear, but some people interpreted it to mean there was no opportunity for public comment. They did not understand that the purpose of that agenda item was to provide the public an opportunity to speak on anything related to FWP that was not already discussed as an agenda item at that particular meeting. It is included on every agenda. There have been no problems with this since its inception over three years ago, however now that it has become an issue, it is appropriate to try to clarify it to avoid further confusion. Other state agencies have indicated that they use essentially the same format. To address this issue, FWP proposes that the agenda item read “Open Microphone – Public Opportunity to Address Additional FWP Issues”.

Hagener said the second issue concerns public comment during meetings where there are final decisions made on season and quota settings. The Commission has allowed comments at tentatives in addition to statewide hearings, which has allowed multiple comment opportunities. When final decisions come before the Commission, comments are typically allowed only on changes to the tentatives. A statement of what is currently being done was written by the Legal Unit and the Communications & Education Division and provided to the Commission. Hagener asked if the Commission prefers to do things differently.

Chris Smith, FWP Chief of Staff, said FWP is trying to provide equity between the public comment process and keeping meetings efficient. The current situation arose after the meeting in August when public testimony was accepted after each motion on the trapping regulations. Folks who were not present at the meeting want their views considered with the same weight as those folks who did attend the meeting.

Smith said one alternative would be that the Commission could establish a public comment period – with equal opportunity to everyone - that would end prior to a Commission meeting. When the comment period ends, that would be the end of it – there would be no public comment at the meetings regardless of changes or not.

Another alternative is that the Commission may want to provide opportunity for comments at meetings on only the changes the Department is making. This still provides an advantage to those people who can attend the meeting, however. A way to avoid multiple repeated testimony would be to separate the department recommendations, the public testimony, and the Commission deliberations into three separate components, and conduct them in that sequence. If the Department plans to recommend changes to tentatives, those recommendations would be made to the Commission, the Commission would open a public comment period on those changes, and then the Commission would move into a deliberative phase to consider the department recommendations and comments, and it would not be opened again to public comment.

Doherty agreed that a policy needs to be established. He said people who testify at hearings feel those who testify at Commission meetings receive more consideration. By the same token, opening to public comment on every change, and every motion is not an effective way to conduct business.

Mulligan said the folks who are unfamiliar with the Commission process prompted this issue. Those familiar with it haven't been a problem. He asked if the agendas would note proposed changes so people can look at them and know, and asked if the Department knows if there will be proposed changes by the time the agenda goes out.

Smith said in most cases the Department knows if there will be proposed changes to the tentatives far enough in advance of the meeting that it could be indicated on the agenda. He added that FWP is looking into utilizing the web to provide audio transmission of Commission meetings at the regional offices. The public could listen in and testify at those locations, and FWP field staff could provide information from their offices.

Brenden said if public comment is taken for each amendment made by the Commission, it would be impossible to get anything done. He stated that the way the legislature conducts business is to have a hearing, then a second reading where discussion and revision occurs, and then the final vote. He said he is in favor of the public providing input, but the same person with the same complaint should not be allowed to comment multiple times. The Commission has bent over backwards to allow comment.

Colton said the suggested language is adequate and makes it clear that after public comment is closed the Commission will only hear testimony on amendments made by the Department or the Commission.

Becky Dockter, FWP Legal Counsel, clarified that this policy only relates to hunting, fishing, and trapping. It is not intended for land transactions, river recreation, etc. The season setting process is a regularly scheduled, annual, well-known process. If comment is limited to only those situations where there are already extensive public comment opportunities, FWP is satisfying the constitutional rights of people to participate in open government deliberations.

Childress said the Commission meetings consist mainly of wildlife items, and there are almost always changes to the tentatives. He is unsure if this action will resolve the issue.

Smith said to think about the decision-making process in three components: Department recommendations, public input, Commission deliberations and decision-making. On issues other than hunting, fishing and trapping seasons, continue to allow the opportunity for public comment. At meetings where final decisions are made, provide a public comment opportunity before entering into the deliberation component, but cut off all testimony when entering the deliberation component.

Doherty agreed with the idea of handling meetings the same as the legislature does. When public comments are taken after the Department makes a recommendation, the public needs to be aware that the Commission can still make changes and there will not be comments on each individual item.

Colton said there is not a problem with the procedure in gathering comments, but apparently there is a small component of people who misunderstand the process. The focus is to make it clear to the public when they get to speak.

Brenden added that people make their will known through telephone calls, letters, e-mails, and personal visits.

Action: Colton moved and Mulligan seconded the motion to amend the agenda item language to say, "Open microphone" -- Public opportunity to address additional FWP issues", and to adopt the policy to close public comment during the final fishing, hunting and trapping season setting meetings except when considering a proposed amendment to the tentative proposal previously adopted, and then the Commission will allow comment on that amendment only. After discussion, Mulligan and Doherty opted to add adjustments to the motion that reflect Chris Smith's recommendation which are the three components of Department recommendations, public testimony, and Department deliberations and decision-making.

Smith said the process would be for the Department to present all of the recommendations at the beginning of a meeting, then the public could comment on any of those changes before the Commission entered into deliberations.

Mulligan agreed it would be beneficial to take public comment before motions are made.

Brenden said he is concerned that he is not sure what the public will understand what is being done.

Mulligan asked if comments would be taken on tentatives. Dockter said it would be worded on the agenda that the Commission would take public comment except where noted. During finals it may be noted that comment periods will be closed on a certain date. There will be a clarification that the Commission will take comments on amendments to tentative.

Action on Motion: Motion carried.

5. Parks Biennial Fee Rule – Tentative. Tom Reilly, FWP Parks Division Assistant Administrator, outlined changes to the fee rule, which are to: clarify that state parks are open all year, incorporate a \$3 per night fee for electrical service at campgrounds with electricity, increase the cabin rental fee from \$39 to \$40 per night, include Brush Lake State Park and non-resident fee, add "donations accepted" for camping at Ackley Lake State Park, Correct Hell Creek State Park fee that was listed as \$12 and should be \$15, remove Johnsrud Park FAS and Prewett Creek FAS from the list of FAS campsites, add Lichen Cliff, Newlan Creek Reservoir, and Prickley Pear to the list of FAS campsite, and make some minor changes and wording revisions throughout the rule.

When asked if Ackley Lake, a primitive site, could be developed and paid for by fees, Reilly explained that fees cannot be charged at primitive state parks, and exceptions must be made through legislative measures.

Joe Maurier, FWP Parks Division Administrator, stated that a parks operational review is being conducted, and one matter under consideration is the issue of primitive parks vs state parks vs. fishing access sites, particularly since Montana no longer charges a resident user fee.

Action: Mulligan moved and Brenden seconded the motion to approve the Parks Biennial Fee Rule with its proposed revisions as a 'tentative' at this time and direct the Department to issue the Rule for public comment. Following public comment, the Rule is to be presented to the Commission in December 2006 for adoption as a 'final' rule.

Chairman Doherty asked for public comment. There was none

Action on Motion: Motion carried.

6. Smith River Special Use Area Rule – Tentative. The Smith River Special Use Area Rule provides direction for FWP's management of the river, including the allocation of private and outfitted launches. **Tom Reilly, FWP Parks Division Assistant Administrator**, said the primary change to the Rule is to grant a fee waiver on up to two authorized outfitter launches for not-for-profit donated trips. During each of the last two seasons, outfitters have requested waivers for donated trips, but there has not been a provision in the Rule to grant these requests.

Other changes include clarification that public launches within the peak float season will be limited to eight individuals, reword the outfitter Permit Transfer section, clarify that sub-letting, leasing, or other transfers of launches to outfitters outside the authorized group of Smith River outfitters is not allowed, update the Smith River Authorized Outfitter table with the current names and individual launch numbers, and add new wording and clarifications to make the Rule more readable and useful in several locations and sections.

Action: Brenden moved and Mulligan seconded the motion to approve the tentative Smith River Special Use Area Rule as recommended by the Department.

Maurier pointed out that there will be a conflict between the Smith River Rule and the Commercial Use Rules, but that will be clarified prior to the final recommendations.

Smith said the Smith River Rule remains unchanged with respect to transferability of licenses of authority, and transferability of launches between authorized outfitters. That would be precluded under the Commercial Use rules, so is not proposed in the Smith River Rule. If the Commercial Use Rule is adopted as proposed, it will mandate the changes in the Smith River Rule.

Mulligan questioned if the Gallus bill applies to this rule. It says "the only way you can transfer launches is with the entire business". Reilly said FWP have not allowed individual outfitters to sell individual launches, however FWP has allowed outfitters to transfer and trade launch days within the season. Mulligan said item "4c" in the new part of the rule states "temporary and permanent", and asked if that would change as it says an outfitter can permanently transfer one launch to another outfitter. Reilly said that is not the intent - the word "permanent" will be stricken from item 4c. Mulligan clarified with Reilly that the term "permit" cover all launches. For example, if an outfitter has ten launches, he has one permit, not ten permits.

Chairman Doherty asked for public comment. There was none.

Action on Motion: Motion carried.

7. Ulm Pishkun State Park Easement Acquisition – Endorsement. Joe Maurier, FWP Parks Division Administrator, explained that this proposal is for the acquisition of a 440-acre conservation easement on the north side of Ulm Pishkun State Park. This site has had relatively little human disturbance due to private ownership and low accessibility, and is the last remaining undisturbed part of the overall jump face. This land has been desired by FWP for several years as it contains several artifacts important to the buffalo jump and Native American culture. The landowner wants to see this site incorporated into the park as well. This proposal has been approved by the Land Board.

The acquisition would initially involve the landowner and DNRC, with FWP purchasing the easement from DNRC.

Action: Doherty moved and Colton seconded the motion to endorse the Department's preliminary proposal to initiate negotiations with DNRC for an interest in the 440-acre parcel at Ulm Pishkun State Park.

Brenden clarified that DNRC will purchase the land in fee title from the Eustance family, then FWP will purchase the easement from DNRC in fee title. Maurier affirmed that is a dollar for dollar deal, and stated that FWP is paying a fair market value to obtain all the rights. Language will be written into the agreement that stipulates that FWP has control of the land.

Action on Motion: Motion carried.

8. Lone Pine State Park Easement Acquisition – Endorsement. Joe Maurier, FWP Parks Division Administrator, explained that this proposal is for the purchase of a 40-acre parcel of land contiguous to Lone Pine State Park. The parcel has been in the same family since the homestead era, and the owners want the land to become part of the Park.

This parcel is also a part of a larger effort by private and public partners to preserve a large open space/wildlife corridor in the Kalispell area. Large blocks of nearby property are currently under conservation easement to achieve these goals.

The land would be acquired through DNRC's legislatively established 'land-banking' program, which allows DNRC to sell isolated or appropriate tracts of land and then utilize those proceeds to purchase more desirable lands that are deemed to be of greater public benefit. In this case, DNRC would acquire the 40-acre parcel from the landowner and FWP would then enter a long-term lease or lease-to-purchase option arrangement with DNRC for the parcel.

Maurier stated that there is no question that this area will be developed in the near future, in fact a large subdivision is going in next to Lone Pine. The landowners have agreed to give FWP one year to purchase the property, after which time they will put it on the market. FWP has appraised the land at \$550,000, and DNRC has agreed with that figure.

Action: Colton moved and Mulligan seconded the motion to endorse the proposal to proceed with negotiations for the potential acquisition of the 40-acre parcel adjacent to Lone Pine State Park for use as a permanent conservation easement.

Chairman Doherty asked for public comment. There was none.

Action on Motion: Motion carried.

9. Bannack State Park Land Exchange – Endorsement. FWP has been approached by a private landowner who is interested in exchanging an 11-acre parcel near the entrance to Bannack State Park for a 16.5-acre mining claim that FWP owns. **Joe Maurier, FWP Parks Division Administrator**, said this site would benefit the Park as it is a great location for a new visitor's center and administrative area. The possibility also exists that the land could be sold or transferred to a private party who may utilize the land for uses that would not compliment the Park if FWP does not proceed with this proposal. The landowner is also interested in leasing underground mining rights on other Department-owned claims east of the Park.

Doherty wants to know what rights FWP would relinquish if the Department exchanges property with this landowner for property he may want to mine. Maurier said that mining issues would be looked into, as would access issues. Should the Commission approve negotiations with the landowner to a stage where an acceptable transaction may be possible, the Department will issue a draft Environmental Assessment.

Action: Mulligan moved and Brenden seconded the motion to approve the Department entering into discussions and negotiations for the acquisition of the 11-acre parcel at the entrance to Bannack State Park. Negotiations will likely involve an exchange of an existing Department-owned parcel near Bannack, and possibly a discussion of leasing mineral rights, and understand what the ramifications to the Park might be, and to not lose track that this is not a pristine area, but is a mining town, and that is what the basis of the history is about, so is totally within the bounds of what the history of the site is, and to not lose track of the fact that this prime piece the Park has wanted for years is under the same risk that FWP is proposing to trade for on the hill in a much more visible location.

Chairman Doherty asked for public comment. There was none.

Action on Motion: Motion carried.

10. L&C Heritage Greenway South Shore Conservation Easement – Endorsement. **Joe Maurier, FWP Parks Division Administrator**, explained that in 1999, the Montana Power Company granted a 2,400-acre conservation easement to FWP along the north shore of the Missouri River from the Giant Springs State Park downstream to Morony Dam. PPL Montana has now agreed to extend this easement along the south shore of the Missouri River from the east edge of Giant Springs State Park downstream, which encompasses 170 acres and 1.5 miles of river frontage. The easement would protect the native habitat along the south shore of the river, and would allow public access on the managed trail system along the south bank. There would be no costs incurred by FWP as the Department already manages the property. Hunting would be prohibited due to the limited size of the site.

Action: Doherty moved and Brenden seconded the motion to endorse further negotiations on the L&C Heritage Greenway South Shore Conservation Easement and to proceed with the EA.

Chairman Doherty asked for public comment. There was none.

Action on Motion: Motion carried.

11. 2007 Annual Rule for Sale of Non-Resident Combination Licenses – Tentative. **Hank Worsch, FWP Licensing Bureau Chief,** said the Variable Priced Licensing Advisory Council met in August to establish fees for the 2007 outfitter sponsored licenses. The members of the Council unanimously agreed to recommend a quota of 5,000 B-10 Outfitter Sponsored Big Game Combination licenses at a fee of \$1,195, a quota of 2,200 B-11 Outfitter sponsored Deer Combination licenses at a fee of \$845, and a fee of \$1,195 for the Outfitter Sponsored Elk Combination licenses. The big game and elk combination licenses come from the same quota. Both categories were oversold in 2006, therefore the quotas were reduced to meet the five-year average.

Action: Mulligan moved and Brenden seconded the motion to approve the tentative 2007 Annual Rule for Sale of Non-Resident Combination Licenses as recommended by the Department.

Chairman Doherty asked for public comment. There was none.

Action on Motion: Motion carried.

12. Future Fisheries Funding Cycle of July, 2006 – Final. The Future Fisheries Improvement Program provides funds for projects designed to restore fishery habitats in streams, rivers, and lakes. Applications for funding are reviewed twice each year by a 14-member citizen review panel, appointed by the Governor, after which the panel's recommendations are forwarded to the Commission for approval. **Glenn Phillips, FWP Fisheries Division Habitat Protection Bureau Chief,** stated that the Review Panel met July 20 to review applications, and from that meeting, now recommend 25 projects totaling \$818,630.

Colton questioned the viability of the Crooked Creek project in Carbon County due to the fires and low water flow. There is a chance there are no fish left in that creek.

Brenden questioned the Box Elder Creek proposal in Phillips County. Phillips said the American Prairie Foundation owns the land. Brenden said there will likely be problems with them.

Mulligan asked if there is a grazing plan incorporated in the Butler Creek proposal in Missoula County. Phillips stated the intent in this proposal is to exclude grazing. Mulligan noted that split-rail five-wire fences are not "wildlife friendly". He asked if there is a policy regarding wildlife friendly fencing. **Glenn Erickson, FWP Field Services Division Administrator** replied that there are several policies. Phillips stated the fencing situation on this project would be investigated further.

Mulligan asked why the Fish Creek proposal in Jefferson County is recommended minus the two in-stream sediment retention basins. Phillips said the basins fill up with sand and are not effective. If the stream is corrected so it is narrower and deeper, the velocity should increase to the extent that it should move sediment more efficiently.

Mulligan said Trail Creek in Gallatin County will need time to recover from a recent fire, and he was concerned that this project might create a private fishery. He asked if a fishing closure could be attached to this project for a period of time, as he would like to see it closed temporarily. Phillips said that the final fishing regulations could do that, and that it will be looked into and brought before the Commission later this meeting.

Brenden suggested that final action on the Box Elder proposal and the Gallatin County Trail Creek proposal be done independently from the rest of the proposals.

Action: Mulligan moved and Colton seconded the motion to approve the Future Fisheries Funding Cycle of July, 2006 as recommended, with the exception of the Box Elder proposal and the Gallatin County Trail Creek proposal.

Chairman Doherty asked for public comment. There was none.

Action on Motion: Motion carried.

Action: Brenden moved and Colton seconded the motion to deny approval of the Box Elder Creek proposal in Phillips County, and to use that money on other projects.

Brenden said there are concerns by citizens and neighbors in the Malta area relative to what the landowners are doing with the ranch, and the feeling is that they are not being good neighbors. The appearance is that they have plenty of their own money they could use on this project, thereby FWP could spend the money elsewhere.

Mulligan said the Commission has never differentiated on landowners based on their wealth - decisions have been made based on the merits of the projects. Colton said it looks like a good project.

Chairman Doherty asked for public comment. There was none.

Action on Motion: Motion failed. One in favor (Brenden) - four opposed.

Motion: Mulligan moved and Colton seconded the motion to approve the Box Elder proposal.

Chairman Doherty asked for public comment. There was none.

Action on Motion: Motion carried. Four in favor – one opposed (Brenden).

Action: Mulligan moved and Colton seconded the motion to approve the Gallatin County Trail Creek proposal with the amendment to include a fishing closure until further notice.

Chairman Doherty asked for public comment. There was none.

Action on Motion: Motion carried.

Action: Mulligan moved and Brenden seconded the motion to include the fishing closure on Trail Creek in Gallatin County in the fishing regulations.

Chairman Doherty asked for public comment. There was none.

Action on Motion: Motion carried.

The following motion was made at the end of the meeting, however it pertains to this topic so it has been placed here.

Action: Mulligan moved and Colton seconded the motion to close Trail Creek in Gallatin County to fishing from the confluence of Browns Gulch upstream. Motion carried.

13. Authority to Stock Tiger Muskellunge – Final. Commissioner Mulligan had inquired at the August Commission meeting if Commission approval was required for FWP to stock tiger muskellunge. The Fisheries Division had been under the assumption that the Commission had already provided prior approval to stock Tiger Muskellunge, along with several other species, under Statute 87-5-714 and ARM 12.7.101, however subsequent to that meeting it was determined that was an incorrect assumption and the Commission does indeed need to approve the stocking of Tiger Muskellunge.

Ken McDonald, FWP Fisheries Division Management Bureau Chief, explained that the Department proposes to stock Tiger Muskellunge into Horseshoe Lake, Lake Elmo, Lake Josephine, and Gartside Reservoir, and is seeking Commission approval to perform these actions. All four proposals have gone through the EA and MEPA processes.

McDonald said FWP is also requesting Commission approval to review ARM 12.7.701 and make any appropriate changes if it is determined that any species should be added to or deleted from the rule.

Action: Colton moved and Brenden seconded the motion to approve the introduction of Tiger Muskellunge into Horseshoe Lake in the Thompson Chain of Lakes in Region 1, into Lake Elmo and Lake Josephine in Region 5, and into Gartside Reservoir in Region 7.

Colton said it is a good opportunity for fishermen in Regions 5 and 7.

Chairman Doherty asked for public comment. There was none.

Action on Motion: Motion carried. Four in favor – one opposed (Doherty).

Action: Colton moved and Mulligan seconded the motion to direct the Department to review the ARM rule regarding authorization for fish stocking, and initiate revisions if appropriate.

Chairman Doherty asked for public comment. There was none.

Action on Motion: Motion carried.

14. Old Steel Bridge FAS/Right of Way Grant to Flathead County – Final. Glenn Erickson, FWP Field Services Division Administrator, explained that Montana Department of Transportation (MDT), on behalf of Flathead County, has requested 2.32 acres of permanent right-of-way at Old Steel Bridge FAS, east of Kalispell, in order to replace an old span-bridge that can no longer handle the increased traffic. Also requested was a temporary construction permit on 1.66 acres at the FAS.

The 128-acre FAS was acquired with LWCF funding, therefore right-of-way needs must be mitigated with replacement lands if there is not a feasible alternative. MDT and FWP anticipated this project need, thus MDT provided \$70,000 for FWP's acquisition of Shady Lane Pond in 2004. MDT has agreed to construct an internal road connecting Shady Lane Pond to Kiwanis Lane, a gravel parking area, sign relocation or replacement, vault toilets, rock barriers, wildlife crossings under the bridge, landscaping, etc. They will also share costs if a new boat ramp is deemed necessary. The public review process, conducted by MDT, generated support for the project.

Action: Brenden moved and Colton seconded the motion to grant the proposed permanent 2.32-acre easement and the temporary construction permit to Flathead County, and approve use of the funding provided by MDT for the Shady Lane Pond acquisition as mitigation for the land interests requested.

Chairman Doherty asked for public comment. There was none.

Action on Motion: Motion carried.

15. Little Doney Lake Easement Proposal – Endorsement. Don Childress, FWP Wildlife Division Administrator, explained that this proposal is a continuance of several projects in the Blackfoot Clearwater WMA, as part of the Blackfoot Challenge. The transaction would proceed as follows: The Nature Conservancy (TNC) would purchase the 1,100-acre property from Plum Creek, and temporarily hold it for the purpose of enabling the proposed conservation easement. TNC would sell the property in 3 parcels to 3 adjoining private landowners, at the current appraised value of approximately \$2,181 per acre. FWP would obtain a 100% gift of a conservation easement from landowners Dale and Ferrar, covering 460 acres and 320 acres, respectively. FWP would obtain a conservation easement on the remaining 320 acres from the third landowner, Enders. All conservation easements would prohibit subdivision, allow livestock grazing and forest management under an approved plan, and guarantee public access. The bargain sale portion of the easement may qualify for funding under a current North American Wetland Conservation Act (NAWCA) grant or FWP will use funding from Habitat Montana. RMEF would purchase the 180-acre property adjacent to Ovando Mountain WMA from the current private owners. FWP would purchase the 180 acres adjacent to the Ovando Mountain WMA from RMEF using Habitat Montana funding.

Action: Colton moved and Mulligan seconded the motion that the Department proceed with negotiations and public involvement to acquire conservation easements on approximately 1,100 acres in the Little Doney Lake project area and fee-title on 180 acres adjacent to Ovando Mountain WMA, using a grant from the NAWCA Program, landowner donations of all or substantial portions of appraised easement values, and funding from the Habitat Montana Program. Motion carried.

16. Dutchman Wetland Acquisition – Final. Don Childress, FWP Wildlife Division Administrator, explained that this is designated part of the wetlands superfund mitigation settlement between ARCO and the State of Montana. The project is 3,750 acres, and lies between Anaconda and Warm Springs. It has been through the EA process, and comments were generally favorable. The local airport supports the project but voiced some concerns that have since been addressed. The airport has requested a small amount of property to construct a fence to keep wildlife out. Childress said there will not be any grazing for at least five years to allow for wetland restoration, and to provide recovery time for vegetation.

Childress stated that the wetland values are there – it is an important piece of ground. Water rights must be obtained to get water back into the Clark Fork. Operational maintenance dollars would be placed into a trust for long-term maintenance. Environmental liabilities have been a longtime concern.

Brenden asked what happens to the neighbors' water rights if the Department gets the water rights. **Larry Peterman, FWP Chief of Field Operations,** said there are 40 cfs of water rights associated with the property. When ARCO acquired the property from the Eulands, they bought the water rights, and in order to buy them, the Eulands had to retire a certain amount of irrigation to get valid water rights. The water rights will be left in-stream, and FWP is negotiating a water lease arrangement to keep it in-stream. There are very few water users in this reach. The large water user was the Euland family, and as part of the sale of their property to ARCO, they retired the bulk of their rights.

Peterman said the airport and the Federal Avian Administration assessed the potential increase of wildlife and migratory birds in the area, and it was decided that FWP would not do any wetland development within 10,000 feet of the airport, and fencing will address the issue of deer on runways.

Brenden asked if additional FTEs would be required. Peterman said since it is near the Warm Springs WMA, there is already staff and equipment nearby.

Doherty asked if FWP would be accepting any liability with this. **Mary Capdeville, Assistant Attorney General, Natural Resource Damage Program,** said there is not an absolute from liability. Liability is not being bought under federal or state environmental laws, but there will still be common law liability. Doherty asked if ARCO has been asked if they will indemnify the state for common law claims, to which Capdeville replied that they have not. She has not seen an indemnification to that extent in a federal or state consent decree.

Mulligan said his understanding is that there is indemnification from ARCO, the EPA, and the Eulands. Capdeville said “we have covenants not to sue, and indemnification that if a party sues FWP, ARCO has committed to pay. We are getting a commitment from these parties that they will not sue us, and we get contribution protection through the consent decree, which means that other parties cannot sue us under the environmental laws, which limits us to tort liability, trespass, and common law claims”. Mulligan asked if FWP has that on all the property we own already. Capdeville replied yes, that the only difference is that there is arsenic here.

Peterman said the reason we are able to take this over and get those indemnifications is because FWP will only allow foot access into the property. There will not be motorized access that will tear up vegetation and stir up dust, etc. Those are conditions of the management of the site associated with contamination issues.

Mulligan asked why ARCO would want to retain the water rights, and if there is a timeframe limitation if FWP leases water rights. Peterman said FWP is able to lease water rights, but not acquire them in perpetuity. That could be changed and this could be a situation where there is justification to change the statute to do that. In leasing water rights, FWP would lease them for a period of time, then could renew them for another period of time, and that would allow time to work through some of the water rights issues. If FWP leases the water rights, FWP can administer and protect them, and object to new uses etc. The reason ARCO is included in the water rights is because from their standpoint, they can use the water rights to rewater part of the Clarkfork downstream, thereby trying to add to their obligation for restoration and remediation. Capdeville said it has been made clear that we need to share the water rights, and if something happens to ARCO, then the water rights would not go away.

Action: Mulligan moved and Colton seconded the motion to accept title to the Dutchman Wetland with access easement and the two conservation easements subject to satisfactory resolution of the Legal Conditions and Environmental Liability Concerns listed in Section 1.11 and 1.12 of the July 2006 Environmental Assessment.

Chairman Doherty asked for public comment. There were none.

Action on Motion: Motion carried.

17. I-154 – Commission Discussion - Informational.

The following is from the State of Montana's Secretary of State's website.

I-154 -- A LAW PROPOSED BY INITIATIVE PETITION

Current law allows state and local governments to take or damage private property for public use, on payment of just compensation. First, this initiative requires governments to waive any new regulation that reduces property values, unless they compensate owners for the reduced value. This requirement does not apply to public health and safety.

Second, this initiative prohibits governments from taking private property if they intend to transfer an interest in the taken property to another private party. This prohibition does not apply to private utility, water, transportation, and mining projects currently defined as public uses.

This initiative requires significant state and local government expenditures to respond to additional property owner claims. Further expenditures to pay property owner claims will depend on future policy choices, and whether state and local governments decide to waive regulations instead of paying claims.

Director Hagener stated that FWP cannot take a position on initiatives. The Department can provide insight as to the agency's view on them, however no recommendations can or will be made.

Bob Lane, FWP Legal Counsel, said if this initiative passes, there will most likely be a great deal of litigation. The intent of this initiative is to have a broad reach in what might be any regulatory taking beyond the current constitutional requirements where the government must pay just compensation. It restricts any regulation that impacts property to the extent that it may diminish value of the property or be an economic loss to the use of that property. Economic loss is very broad in scope because almost

any kind of regulation of use of property potentially has an economic loss to someone. A zoning regulation may have economic benefit to many people, but one individual may suffer economic loss. This initiative does not balance the benefits vs. the losses – it only concentrates on losses.

Lane said the definition of damages reads “damages that occur when government regulations enacted after acquisition of ownership can result in diminished value or economic loss”. This says that it is damage to property occurring when government regulations are enacted after acquisition of ownership. If this initiative does pass, the property ownership that is acquired and damages occurred, after acquisition, the property interest can be acquired before the initiative is adopted. That makes a significant difference. The idea is not simply that the initiative passes and then the effects after passage are considered, but the initiative passes, and the government regulation may have been adopted prior, as long as they are after the acquisition of the property, this triggers the definition of damages. The initiative says that private real property damaged by an enactment or enforcement of government regulations requires compensation.

Lane outlined possible positions and arguments that others could make. FWP has a number of regulations related to captive wild animals and game bird shooting preserves, so any new regulations or legislation that would regulate these would require FWP to look back to see what regulations were in effect against the property, and to determine if the property was acquired before these regulations went into effect. Another concern relates to hunting regulations. People may be using their property for paid hunting, and should the Commission reduce the quota there, a claim could be made that this quota change would have an economic loss to that landowner. The same could apply to fishing regulations, to outfitters who utilize property for income, and to game farms. Stream access might also be impacted if someone who had the property before the stream access laws were enacted suffered economic loss. He said the key to the interpretation of this initiative is the language “it’s the enactment or enforcement of government regulations after the acquisition of property”.

Mulligan asked how this initiative would relate to water laws. For example, if he owns a piece of property and DNRC changes their laws for drilling wells, and the water tables don’t match DNRC’s criteria so he cannot drill a well from which to irrigate. Lane said that well could be considered a loss of economic impact.

Lane said in the present takings law, the benefits are weighed against the impacts. That would be amended out in this initiative.

Brenden said he questions whether the Commission should be involved in this issue. He is not sure that this is the right place to address this.

Colton disagreed, saying the Commission has a responsibility to understand how something may affect the Commission’s business and how it manages the resource. The Commission pays attention to laws and legislation that impacts FWP, and he does not feel that holding this informational session is departing from the Commission charter. He can foresee problems for many people.

Mulligan agreed with Colton that it is appropriate for the Commission to discuss this issue – the Commission would be greatly remiss not to. FWP could suffer a significant fiduciary impact should this initiative pass, and people want to know what the initiative means and how it will affect them. Mulligan said fish ponds, exotic species, and listings of endangered species will be impacted by the initiative, as would any situation where a hunting season would change from an open season to a permit situation.

Doherty said it appears there is no statute of limitations. If someone had acquired a property thirty years ago, and there was an enactment of a regulation or law in the next legislative session that was felt to damage this property, that person could send a letter to the legislature or the Governor demanding that they waive the law, or rescind the law, or send payment. He asked who pays the claim? Lane said I-154 provides that the demand for payment goes to the governmental body who enforces the damaging regulation. Lane said that federal funding would not qualify for payment of damages, and if FWP did not have the money, it would have to go before the legislature.

Doherty asked if FWP has any estimates of what the potential fiscal impact might be. Lane said the fiscal note on this initiative regarding hunting said “because fee hunting on private land is significant, the amount of compensation may be very large, but is an undetermined amount at this time”. There was not a way to establish an estimate on this like there is with normal fiscal notes where assumptions can be made.

Smith said the that as soon as the Department was forced to make a payment using license dollars, FWP would be in violation and would lose eligibility for federal aid dollars - approximately \$12 million per year.

Doherty said it is useful to have this discussion, and said he was not asking the Commission to take a position at this point, but it needs to be considered. Lane said as appointed officials, the Commission can take positions on ballot issues.

Doherty said if it is the will of the Commission to support or oppose this initiative, public comment will be taken. It was decided to place this topic on the October Commission agenda.

18. Public Opportunity to Address Issues Not Discussed at this Meeting.

Anthony Botts provided an on-line demonstration of a website he created that is dedicated to hunting on public lands in Montana. An annual fee would be assessed to utilize this site and obtain information from it.

~~

Colton attended a Friends of Bighorn Lake meeting in Lovell, WY, and said that they take issue with Montana letting water out to feed the Bighorn River. He explained to the group that this is a drought year, and Montana has cut the flow back to 1,500 cfs. They talked about the decline in fish numbers, and about the economic impact. The net economic value to the Bighorn fishery is normally around \$33 million, but is down to \$15 to \$20 million. Colton said the group does not care about the 1,500 cfs, and they asked the Bureau of Reclamation (BOR) to drop it even lower before the brown trout spawn. Wyoming does not care. They are an organized group and are raising money. Ironically, Montana supplies the fish for the lake.

Colton said even if Montana completely shut down the Bighorn River to fill up Wyoming's end of the lake, the sediment problems at Horseshoe Bend would not leave a viable boat ramp or access. The BOR has refused to cut the cfs below 1,500. The BOR has operating plans, however there are clauses that allow discretions. Montana will hold a public hearing in October in Billings. It is anticipated that there will be representatives from the Governor's Office and from Senator Baucus' office at the meeting.

~~

Hagener said Commissioner Workman had asked about the elk that escaped from the game farm in Idaho. Hagener said that Idaho and Wyoming are proactively trying to remove those elk. The game farm is approximately thirty miles south of Montana's border. Most of the elk do not have tags, but if FWP personnel spot any that do have tags, they have been instructed to kill them. Hunters in the area have been informed as well, however this is not to be a free-for-all, or many elk will be killed that have nothing to do with the game farm. According to information from Idaho, Hagener said they have had problems with this game farm relative to improper fencing, improper vaccinations, improper blood tests, and documentation. There may be red deer in the herd as well. The game farm has had three quarters of a million dollars assessed against him in fines.

~~

Action: Colton moved and Mulligan seconded the motion to adjourn the meeting. Motion carried.

Meeting adjourned at 1:05 p.m.

Steve Doherty, Chairman

M. Jeff Hagener, Director